SUPREME COURT, U. S.

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No. 510

In the

Supreme Court of the United States

OCTOBER TERM, A.D. 1967.

MARVIN L. PICKERING,

Plaintiff-Appellant,

vs.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 205, WILL COUNTY, ILLINOIS,

Defendant-Appellee.

On Appeal From
The Supreme Court of Illinois

REPLY BRIEF OF PLAINTIFF-APPELLANT

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Considered in the light of defendant's brief, plaintiff's arguments have not been seriously challenged.

I. PLAINTIFF WAS DISMISSED FROM HIS EMPLOYMENT AS A PUBLIC SCHOOL TEACHER BECAUSE HE EXERCISED HIS FIRST AMENDMENT RIGHT OF FREE SPEECH (Pl. Br. 12-16)

Whether plaintiff's letter was constitutionally protected or not, defendant's brief demonstrates that it alone and nothing else prompted his dismissal. Defendant acknowledges that the letter concerned school finance and other

school policies noting that raising money "is the most vital" of the board's activities (Def. Br. 13) and is a "paramount" responsibility of the board (Def. Br. 8). Defendant's lengthy expository statement about the operation of schools (Def. Br. 5-9) removes any doubt that the subjects of the letter were matters of public concern.

Defendant makes no reference to *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) and related cases; nevertheless, it apparently wishes to avoid those cases because board of education members are public officials "only in the narrowest definition of the word elected" (Def. Br. 13) and because the superintendent is not "elected" (Def. Br. 22). That the board members and the superintendent are public officials within the scope of *New York Times* and subsequent cases can hardly be doubted. There is by statute only one general superintendent in a school district. Ill. Rev. Stat., Chap. 122, Sec. 10-22.4 recites some of his significant roles:

> The superintendent shall make recommendations to the board concerning the budget, building plants, the locations of sites, the selection of teachers and other employees, the selection of textbooks, instructional material and courses of study.

In the case at bar, the superintendent was probably the most important school official in the district. It is significant that the dismissal resolution referred to the superintendent and board members as "carrying out their official duties." (App. I, 10)

A review of defendant's brief leaves no other conclusion than that plaintiff's letter concerned public matters and public officials and that his dismissal, whether justifiable or not, was solely and exclusively based on statements which come within the scope of the first amendment's concern for free speech.

II. PUBLIC EMPLOYEES ARE ENTITLED TO FULL FIRST AMENDMENT RIGHTS (Pl. Br. 16-21)

Defendant effectively ignored this proposition. Instead defendant offered several loose and shifting standards which might be applied in free speech cases. Defendant refused to recognize that the selection of a proper standard depends in large measure upon the more fundamental question as to what constitutional rights public employees possess. Defendant's suggestion that a teacher's statements ought to be "responsible, intelligent, and factual" (Def. Br. 14) while having a certain persuasiveness cannot stand if teachers really have full first amendment rights as this Court said in *Garrity* v. *New Jersey,* 385 U.S. 493 (1967) and other cases. Instead such statements require judgment according to a rule similar to that used in *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). This necessarily follows from our unchallenged proposition that public employees do have full first amendment rights.

III. DEFENDANT BOARD OF EDUCATION HAS ASSERTED NO OVERRIDING INTEREST WHICH MIGHT JUSTIFY A LIMITATION OF PLAINTIFF'S FIRST AMENDMENT RIGHTS (Pl. Br. 21-39)

Plaintiff's analysis (Pl. Br. 22) of the four areas of interest which according to the board's dismissal resolution, (App. I. 9-10) had been adversely affected by plaintiff's letter drew no response in defendant's brief. The "reputations" of the schools and the officials which played such a prominent role in that resolution have now so receded in importance that the term "reputation" nowhere appears in defendant's brief. Also unchallenged is plaintiff's analysis of the other interests which were supposedly affected adversely.

VI. PLAINTIFF'S STATEMENTS WERE SUBSTANTIALLY CORRECT. (Pl. Br. 55-67)

Plaintiff's analysis of the factual basis for the statements in his letter has prompted an answer by defendant which merely repeats the conclusions that the board had reached even before the hearing. Two members of the Illinois Supreme Court agreed that:

> "The falsity of the principal statements contained in plaintiff's letter was not established." (App. I, 147)

If reasonable men at this level disagree, defendant ought to do more than repeat in summary fashion the charges against plaintiff.

Defendant's own brief raises doubts about its ability to determine what is accurate or inaccurate. Its overreaction to the legitimate interpretation in the ACLU's brief of the role of board adviser is symptomatic of its basic approach. We also note the board's reference to a "union" (Def. Br. 10) and "negotiations" (Def. Br. 8) which may leave an incorrect impression. Defendant also displays a misunderstanding of school finances. At page 6 of its brief, it states:

> In order to control school finances, the General Assembly has established three basic funds; namely, the Educational Fund, Building Fund and Transportation Fund, providing by mandatory legislation amounts which high schools (any school district) could raise for those purposes. The said funds can be used only for the purposes intended and cannot be interchanged and cannot be commingled. Teachers' salaries are paid from the Educational Fund.

Defendant apparently intended to persuade the Court that such comments in plaintiff's letter as:

> "To sod football fields on borrowed money and then not be able to pay teachers' salaries is getting the cart before the horse." (App. I. 13)

could not possibly be true because financial policies affecting one fund could have no effect on any other fund. If this is true then the superintendent in his letter must have made a false statement or revealed a misdeed when he said:

> "8. The present .02 cent transportation rate is inadequate—we borrow from the education fund to make ends meet." (App. II, 38).

Actually, the Illinois School Code provides that if the transportation fund has insufficient funds the board can transfer money from the educational fund to the transportation fund. (Ill Rev. Stat. Chap. 122, Sec. 17-8) Other provisions allow the board a choice of funds as the source of revenue to pay certain expenses. Whether this selection or transfer is distinguishable from "interchange" we do not know, but the board has considerably more latitude in setting up its budget than defendant implies. Defendant also asserts that:

> "It is illegal, in Illinois, to accumulate tax money out of any of the basic funds mentioned." (App. I, 6)

Actually, Ill. Rev. Stat. Chap. 122, Sec. 17-5.1 allows such accumulation if the voters by referendum so elect. While this information may have no particular relevance to the issues in this case it again demonstrates an inability by the board to conform to the same standards it wishes to impose on plaintiff.

We submit that if the complexities of school finance are beyond the comprehension of the board, it should not be especially harsh upon a teacher who thinks there is some relationship between the various funds. We do not think a teacher should be held responsible for assuming that the superintendent meant "teachers' salaries" when he said "teachers' salaries" (App. II, 8). We submit that plaintiff

Instead the board has constructed a new set of interests and duties:

1. An "obligation of loyalty to support the generally accepted goals of education as established by the Board of Education and the State" (Def. Br. 4, 12, 14).

2. A duty to provide "intelligent cooperation" (Def. Br. 14).

3. A duty not to affect adversely "the proper and efficient education of the children of the district" (Def. Br. 12).

The board has not "established" any set of "generally accepted" goals of education, nor has the State of Illinois. The board has not identified which, if any, of these so called goals plaintiff did not support. We know of no "goal of education" which requires a teacher to support a tax increase proposal and if there was such a goal, the record does not disclose how plaintiff has failed in that regard. His letter was written and published immediately *after* the tax increase proposal had gone down to its second defeat; the record reveals no plans for a third. The idea that the letter might jeopardize a possible future tax vote appears unwarranted for in another connection the board sustained an objection "on the ground that what occurred after October 8, 1964 is not pertinent to the issue" (App. I, 90).

The "intelligent cooperation" which defendant now demands implies that there was a vehicle by which this could be accomplished. Defendant's reference to "the executive board of the union" (Def. Br. 10) and the school board being faced with "contract negotiations with teachers" (Def. Br. 8) lends credence to the idea that the teachers, including plaintiff, were represented by a union under a collective bargaining agreement. As a matter of fact, no organization represented teachers for purposes of collec-

tive bargaining; there were no negotiations; there was no agreement; there was no grievance procedure. There was no vehicle for "cooperation", intelligent or otherwise.

More significantly, the matters about which plaintiff wrote were not "grievances" for which plaintiff could obtain redress. Fiscal and architectural *policies* are matters for public debate. Even an orderly procedure for redress of grievances does not preclude public debate about such matters.

The board's "intelligent cooperation" hypothesis assumes that voters have a duty to pass tax proposals and must be protected from information which might lead them to refuse to discharge that duty (Def. Br. 12). This concept of the voter hardly comports with principles of representative government. The acceptance of defendant's premise would allow public school boards and other government officials to confront voters with a captive lobbying force supporting the goals those officials "generally accepted." There would, under defendant's scheme, be no need for the voters except to pay taxes.

The most appealing new interest which the board now presents is "the children of the district." The board in its charges and during the hearing mentioned no harm to Pickering's students.

We submit that even if plaintiff's relationship with students now was before the court, his public statements are entitled to be judged by constitutional standards. This case in no way involves "children." It involves adult citizens of a community engaged in political debate and should be judged accordingly.

We submit that the interests now asserted by defendant have made their appearance too late in these proceedings

to justify their consideration and that like the original "adversely affected interests" are at war with the facts and cannot justify limitation of plaintiff's right of free speech.

IV. PLAINTIFF WAS DISMISSED BY AUTHORITY OF A STATUTE WHICH IS UNCONSTITUTIONALLY VOID BECAUSE IT IS VAGUE (PL. BR. 39-47)

We have argued that the Illinois dismissal statute (Ill. Rev. Stat. Ch. 122, Sec. 10-22.4) contains no language limiting free speech and that likewise the board had no rule or regulation. This has drawn the response that the word "cause" is sufficient authority even though, as defendant acknowledges, it is a "silent" word. (Def. Br. 9)

The board cites no case which holds that "cause" is a word which properly limits first amendment rights. It seeks to avoid the thrust of this Court's requirements of precision, in those first amendment cases considering loyalty oaths, by asserting that such oaths bear no relationship "to a person's efficiency, competency or ability to carry out his teaching responsibilities" (Def. Br. 16). If defendant is correct, we fail to see how plaintiff's letter bears any greater relationship to his competency or ability to teach.

However, the loyalty oath cases are not distinguishable on this ground for as this Court apparently recognized in its January 22, 1968 *per curiam* upholding of *Knight* v. *Board of Regents*, 269 F. Supp. 339 (D.C.N.Y. 1967), a loyalty oath may have some relationship. We submit that whether first amendment rights are being affected by requirements of a loyalty oath, dismissal proceedings or any other manner, the limitation must be clear and precise. In the case at bar, there is a complete absence of any limitation.

Apparently recognizing a need to provide some standard by which plaintiff's letter can be measured, the board has now supplied a variety. It refers to the statements as "false or recklessly made" (Def. Br. 10), "untrue and misleading and detrimental to the best interests of education" (Def. Br. 10), "false statements knowingly or recklessly made" (Def. Br. 13), "a reckless, childish, inaccurate, irresponsible, pointless and incoherent publication by a teacher in opposition of legitimate board policy" (Def. Br. 14).

The board asserts that public statements ought to be "responsible, intelligent and factual" (Def. Br. 14) or should be made "factually and accurately, commensurate with his education and experience" (Def. Br. 10).

We are as unable to determine what defendant means by "intelligent," "responsible" or "recklessly made". We are also unable to determine by what logic he avoids the application of the standards set out in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). Assuming, however, that defendant's words mean something, they are without any authoritative support and more significantly had not even a latent existence in any statute, rule or regulation in effect when plaintiff wrote his letter. The only guide plaintiff had was the letter of September 18, 1964 signed "Your Board of Education and Administration" which itself could not meet the tests defendant suggests (App. II, 37-38).

We submit that our "Void for Vagueness" argument not only has not been answered but has been confirmed by defendant.

V. PLAINTIFF WAS DISMISSED UNDER A PROCEDURE WHICH VIOLATED HIS RIGHTS OF DUE PROCESS (Pl. Br. 47-54)

Defendant challenged this argument on the grounds that the procedure did not violate due process and the question was not properly raised below.

In the course of argument, defendant charged the *amicus curiae*, Illinois Division of the American Civil Liberties Union, with making a "completely false and unwarranted" statement regarding the dual function of Mr. Louis Bertani as prosecutor and attorney for the board at the hearing (Def. Br. 20). We submit that the comments of the *amicus* were justified. It is obvious that Mr. Bertani prosecuted the case and this, defendant duly noted. Attorneys for plaintiff also know that Mr. John Verklan acted as board adviser, but this is not reflected in the record and in fact it appears that the *amicus* was justified in relying on the following matter at the start of the hearing:

> "Mr. Louis Bertani is present and will act as legal adviser for the Board of Education" (App. I, 39).

We suggest that this is but one aspect of a more basic defect. The board was both adversary and judge. As we pointed out in our first brief the adversary role of the board in this case is not merely nominal. The board was vindicating its reputation and that of its members. We submit that this procedure is fundamentally unfair.

We further note that the cases cited by defendant that litigants do not have a right to a particular procedure are not relevant because they did not involve government agencies which were both judge and adversary of a litigant.

Nor do we agree that this is a new issue interjected at the last minute. The complaint in the Circuit Court of Will County challenged both the procedure and the free speech question. Paragraph 17(1) of the complaint questioned the procedure and paragraph 17(m) addressed the free speech question (App. I, 7). In a further specification of Paragraph (1) plaintiff incorporated matters which were already part of a specification of Paragraph (i):

> "It is clear that the allegations in the charges . . . are personal reactions to the letter written by the plaintiff.
> a. . . .
> d. If the charges or the decision (or both) are made capriciously, it is inferreable that they were made in anger or hatred and from reasons of bias."

Defendant (Def. Br. 18, 19) quoted material from the specifications for paragraph (1) but failed to incorporate therein the above language. (We might add that we are uncertain as to what defendant was referring because he states he is quoting from the specifications of paragraph 17(i) but he actually set out material that was a part of the specifications of paragraph 17(1).) In any event, the matter has been considered below, the Illinois Supreme Court noted that the plaintiff had a fair hearing and the dissent disputed that point.

Whether or not the procedure below was fair or unfair, whether or not the question was properly raised, and whether or not it was considered by the Court, plaintiff still insists that his letter, being within the purview of the first amendment was entitled, should have been judged upon an independent determination by a reviewing court. We submit that the rule of *Jacobellis* v. *Ohio,* 378 U.S. 184 (1964) required this. If *Jacobellis* had been followed plaintiff's rights would have been protected, even though the hearing itself was unfair.

should not be held responsible for not knowing that the superintendent had left out a further definition of teachers so as to include "counsellors, principals and their assistants, their secretaries . . . also contingency." (App. I, 69)

The failure of the board to respond to our review of the facts and its own inaccurate exposition of the Illinois School Code leaves plaintiffs Point VI unchallenged and also reinforces our contention that no judge can properly judge his own case. This is the constitutional fallacy of the Illinois dismissal procedure.

CONCLUSION

We submit that defendant has, in the main, not responded to plaintiff's arguments and that where it has responded, its arguments only confirm plaintiff's position.

Considering plaintiff's original brief and argument in the light of defendant's random attack, we submit that on the facts and on constitutional principles, plaintiff's initial venture into public debate should not have been made his last.

Respectfully submitted,

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